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No. 91-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

THERESA A. BURKE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-four million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), and state anti-discrimination laws. One of AARP's primary objectives is to strive to achieve dignity and equality in the work-

place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

A fundamentnal issue in the case before the Court is the nature of the injury caused by discrimination. The Sixth Circuit Court of Appeals relied on decisions applying Section 104(a)(2) to the ADEA [1] when it ruled that the respondents' Title VII [2] damages resulted from personal injuries, and were therefore excludable from gross income.

Age discrimination, like sex discrimination, injures an individual's rights and personal dignity. Ageism in the workplace causes older persons to feel useless and powerless. It lowers their self-esteem and perceived personal control.

AARP concurs with the arguments set forth by Respondents that Title VII damages should be excludable from gross income as personal injuries under Section 104(a)(2). Given the potential ramifications of this case for victims of age discrimination, AARP submits its brief *amicus curiae* [3] to facilitate a full consideration by the Court of the issues and interests involved in recognizing discrimination as a personal injury.

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[1] *Redfield v. Ins. Co. of North America*, 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990); *Downey v. Commissioner*, 97 T.C. 150 (1991); *Keller v. Commissioner*, 62 T.C.M. 401 (1991).

[2] 42 U.S.C. § 2000e *et seq.*

[3] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

The Government's approach is based on the construction of an artificial category in the tax law to which all victims of discrimination are assigned. This category mistakes the measure of an injury for the injury itself. Moreover, this approach conflicts with the long-standing definition of "personal injury" that is premised on legislative compassion toward tort victims.

A victim of discrimination, whether based on gender or age, suffers an injury implicating the "tort or tort type rights" contemplated by the regulations of the Commissioner of Internal Revenue. 26 C.F.R. § 1.104-1(c). Without explanation, the Government would abandon this straightforward and consistent standard for an approach that is overbroad and unworkable. Moreover, such an approach disregards the sound Congressional purposes underlying the tax treatment of damages for personal injuries.

ARGUMENT

I. THE GOVERNMENT INVOKES AN IMPROPER STANDARD FOR PURPOSES OF IDENTIFYING THE PROTECTED CLASS UNDER SECTION 104 (A)(2).

The statutory exclusion for "any damages received . . . on account of personal injuries," 26 U.S.C. § 104(a)(2), has been interpreted by regulations of the Commissioner of Internal Revenue to include suits based on "tort and tort type rights." 26 C.F.R. § 1.104-1(c). From these simple elements the courts have synthesized an easily administrable standard:

> [Personal injury means any invasion of] the rights that an individual is granted by virtue of being a person in the sight of the law.

Rickel v. Commissioner, 900 F.2d at 663, *quoting Threlkeld v. Commissioner*, 87 T.C. 1294, 1308, *aff'd*, 848 F.2d

81 (6th Cir. 1988). Over the last 73 years, the exclusion rule of Section 104(a)(2) has been applied to a large number of cases with remarkably little statutory adjustment.[4]

The courts have applied the definition of personal injury consistently and responsibly, holding that the element of personal injury inheres in a variety of non-physical injuries, notwithstanding the fact that lost earnings are used to measure damages for purposes of fixing compensation. *Redfield*, 940 F.2d 542; *Burke v. United States*, 929 F.2d 1119 (6th Cir. 1991); *Pistillo*, 912 F.2d 145; *Rickel*, 900 F.2d 655; *Threlkeld*, 848 F.2d 81; *Byrne v. Commissioner*, 883 F.2d 211 (3d Cir. 1989); *Metzger v. Commissioner*, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3d Cir. 1988); *Downey*, 97 T.C. 150; *Keller*, 62 T.C.M. 401; *Madson v. Commissioner*, 55 T.C.M. 1351 (1988). This definition has not impaired the ability of the courts to make appropriate distinctions between actions for personal injuries and actions for breach of employment contracts. *See, e.g., Nagourney v. Commissioner*, 57 T.C.M. 954 (1989), *aff'd without published opinion*, 904 F.2d 700 (4th Cir. 1990); *Kurowski v. Commissioner*, 917 F.2d 1033 (7th Cir. 1990).

The Government offers no reason to depart from this long-standing definition. Virtually abandoning the Commissioner's own formula ("tort or tort type rights"), the Government advances no explanation of what it understands "personal injury" to mean under Section 104(a)(2). The Government would treat Title VII claimants, ADEA plaintiffs, and other victims of discrimination identically for purposes of Section 104(a)(2) on the theory that the measure of damages in their cases is based in whole or in part on lost earnings. While purporting to respect the settled decisions on physical injuries and classical common law torts, the Government's argument cannot be so limited, for it would exclude from Section 104(a)(2) even traditional tort victims who receive damages for impaired earning ability.

[4] The first real change in the language of the exclusion rule at issue in this case did not occur until 1989, and does not affect these proceedings. *See* 26 U.S.C. § 104(a)(2) (final sentence); H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 622-23, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3225-26.

The Government's acknowledgement of the applicability of Section 104(a)(2) to an outright loss of employment, *cf.* Rev. Rul. 85-97, cannot be reconciled with the Government's opposition to exclusion in the case of a partial loss. Section 104(a)(2) contains no factor suggesting a distinction among tort victims on the basis of total or partial loss of employment opportunities.[5]

II. SECTION 104(A)(2) EXTENDS LEGISLATIVE COMPASSION TO "TORT AND TORT TYPE" VICTIMS.

The Government's approach to the exclusion rule of Section 104(a)(2) confines itself to the economic policy of avoiding the imposition of an income tax on capital. Pet. Br. 13-14. The Government advances this theoretical consideration as the only support in *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983), for applying Section 104(a)(2) to non-physical injuries. However, the Government's approach ignores the *Roemer* court's explanation of Section 104(a)(2):

> The rationale behind the exclusion of the entire award [including damages for lost earnings] is apparently a feeling that the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components of a lump-sum award.

716 F.2d at 696.

[5] If such a distinction were found to exist, it would seem inconsistent with Section 104(a)(1), which offers a parallel exclusion in the case of damages in the nature of workmen's compensation. *See* 26 U.S.C. § 104(a)(1).

The Congressional goal in enacting the predecessor of Section 104(a)(2) in 1918 could not have been merely to prevent the imposition of an income tax on "capital," since the prevailing view at that time perceived constitutional impediments to such taxation. *See Eisner v. Macomber*, 252 U.S. 189 (1920). Neither Section 104(a)(2) nor its regulations were modified in the wake of *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, *rehearing denied*, 349 U.S. 925 (1955), to reflect the capital-shielding role the Government would now thrust upon Section 104(a)(2). On the contrary, one year after the decision in *Commissioner v. Glenshaw Glass Co.*, the Commissioner of Internal Revenue promulgated regulations making clear that this broad statutory exemption included proceeds from "the prosecution of a legal suit or action based upon tort or tort type rights." 26 C.F.R. § 1.104-1(c). The *Roemer* court understood the significance of *Commissioner v. Glenshaw Glass Co.* as diluting the tax-theoretical "capital" objection to taxation of personal injuries:

> Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth. Nevertheless, Congress in its compassion has retained the exclusion (now codified at I.R.C. § 104(a)(2)).

Roemer, 716 F.2d at 696. (emphasis added.)

The definition of personal injury adopted by the courts for purposes of Section 104(a)(2)—any invasion of the "rights that an individual is granted by virtue of being a person in the sight of the law," *Rickel*, 900 F.2d at 663, —furthers the legislative compassion recognized by the Ninth Circuit in *Roemer*. Moreover, there is no link between this definition of personal injury and the purely tax-theoretical shielding of capital as suggested by the Government.

III. AGE DISCRIMINATION, LIKE SEX DISCRIMINATION, IS A PERSONAL INJURY.

Age discrimination can have devastating psychological and sociological effects on an individual as it causes feelings of uselessness and powerlessness.[6] Lowered self-esteem and personal control also result from the perception of age discrimination,[7] which can lead to burnout and personal strain.[8]

The typical victim of age discrimination has dedicated his life to a company and his self-worth is tied to his status as an employee for that company. For such employees, "the shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression."[9] Thus, forced retirement, not age, can be the cause of a significant decline in mental and physical ability, as such discrimination condemns individuals to "an idleness that hastens their decline."[10]

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[6] *See* Cowgill, *The Aging Population and Societies*, 415 Annals of the American Academy of Political and Social Science 1-18 (1974); Butler, *Ageism: Another Form of Bigotry*, 9 The Gerontologist 243-246 (1969).

[7] Hassell and Perrewe, *An Examination of the Relationship Between Older Workers' Perceptions of Age Discrimination and Employee Psychological States* (unpublished 1991).

[8] Perrewe, Brymer, Stepina, and Hassell, *A Causal Model Examining the Effects of Age Discrimination on Employee Psychological Reactions and Subsequent Turnover Intentions*, Int'l. J. of Hospitality Mngt. (1991).

[9] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 641 (1976).

[10] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 642 (1976); Somers, *Social, Economic, and Health Aspects of Mandatory Retirement*, 6 J. of Health, Politics, Policy & Law 542, 547 (1981) (studies show that the mortality rates of older persons increased after involuntary retirement).

Recognition of the personal trauma of age discrimination has remained in the forefront of federal legislative policies with respect to age discrimination. The Select Committee on Aging has reaffirmed Congressional views on the devastating personal effects of age discrimination:

> Compulsory retirement robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity and encourages atrophy and decay . . . .
>
> There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health.

Mandatory Retirement: The Social and Human Cost of Enforced Idleness, 95th Cong., 1st Sess., Comm. Pub. 91, at 22 (1977).

The courts have readily discerned the same objectives:

> [A]ge discrimination in employment is a tragic waste of human resources . . . the result of [u]nfavorable beliefs and generalizations about older persons [which] have grown up over the years and, in many instances, have hardened into restrictive policies and practices.

Christie v. Marston, 551 F.2d 1080, 1084 (7th Cir. 1977) (citations omitted).

> The [ADEA] was intended to alleviate the serious economic and psychological suffering of people between the ages of 40 and 65 caused by widespread job discrimination against them.

Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D.N.Y. 1974), *aff'd without opinion*, 489 F.2d 752 (2d Cir. 1974).

> The purpose of the ADEA was to alleviate serious economic and psychological suffering of persons within this age range [40-65], caused by unreasonable prejudice and job discrimination.

Polstorff v. Fletcher, 452 F. Supp. 17, 23 (N.D. Ala. 1978).

The injury suffered by victims of discrimination whether based on age, gender, or race, is much more than the economic loss of a contract. It is not simply the lost income from a job but the damage to a worker's social role and psychological security. Although sometimes measured with reference to lost earnings, age discrimination is an invasion of one of the most basic rights that individuals are granted by virtue of being persons in the sight of the law: the feeling that they have not outlived their usefulness. *Cf. Rickel*, 900 F.2d at 663; *Threlkeld*, 87 T.C. at 1308.

IV. THE GOVERNMENT'S OVERBROAD TREATMENT OF TITLE VII AND THE ADEA IGNORES CRUCIAL STATUTORY VARIATIONS.

The Government suggests a sweeping approach that treats all damages for employment discrimination the same. Such an overbroad approach ignores crucial differences in the remedies available under state and federal laws other than Title VII or the ADEA and the accepted tax treatment of such damages.[11] It also fails to account for the uniform exclusion under Section 104(a)(2) of liquidated damages under the ADEA, damages which are unavailable under Title VII.

Almost every state has adopted statutes prohibiting sex and age discrimination.[12] Neither Title VII nor the

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[11] A similar artificial distinction would be introduced by the dichotomy between actions at law and actions in equity, recently employed by the Court of Appeals for the District of Columbia Circuit in *Sparrow v. Commissioner*, 91-2 U.S.T.C. ¶ 50,567 (D.C. Cir. 191) to exclude from Section 104(a)(2) back pay damages received in settlement of a civil rights action under Title VII.

[12] Forty-six states plus the District of Columbia currently have laws prohibiting age discrimination against private and public employees. *See* Alaska Stat. § 18.80.220(a)(1); Cal. Gov't Code

ADEA preempts state law tort damages, including emotional distress, or pendent state claims. *See, e.g., Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1318 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). The injuries suffered by victims under these state statutes clearly transcend the loss of a contract right. *See, e.g., Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 210 (6th Cir. 1990):

> [The victim] specifically testified that he was shocked and humiliated .... [He] later moved away from his family in order to maintain employment, and he testified that he believed the move had an adverse effect on his marriage. [His] wife testified that he was upset to the point of crying and that he never really overcame the shock and humiliation of the termination.

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§ 12941(a); Colo. Rev. Stat. § 8-2-116; Conn. Gen. Stat. § 46a-60(a)(1); Del. Code Ann. tit. 19, § 710(7); D.C. Code Ann. § 1-2502(2); Fla. Stat. § 760-01-10, 112.043-44; Ga. Code Ann. §§ 34-1-2(a), 45-19-20 to 42; Haw. Rev. Stat. § 378-2; Idaho Code § 67-5910(7); Ill. Rev. Stat. ch. 68, para. 1-103(a); Ind. Code § 22-9-2-1; Iowa Code § 601A.6(1)(2); Kan. Stat. Ann. § 44-1115; Ky. Rev. Stat. Ann. § 344.010(4); La. Rev. Stat. Ann. § 972; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Code Ann. art. 49B, § 16(a); Mass. Gen. Laws Ann. ch. 151B, § 1(8); Mich. Stat. Ann. § 3.548 (202); Minn. Stat. §§ 181.81, 363.03(1), (2); Mo. Rev. Stat. § 213.055(1); Mont. Code Ann. § 49-2-303(1); Neb. Rev. Stat. § 48-1003(1); Nev. Rev. Stat. § 613.330(a); N.H. Rev. Stat. Ann. § 354-A:8(I); N.J. Rev. Stat. § 10:5-2.1; N.M. Stat. Ann. § 28-1-7 (A); N.Y. Exec. Law § 296(3-a)(a); N.C. Gen. Stat. §§ 126-16, 143-416.2; N.D. Cent. Code § 14-02.4-02(1); Ohio Rev. Code Ann. § 4112.02; Okla. Stat. Ann. tit. 25, § 1302.(1); Or. Rev. Stat. § 659.030(1)(a),(b); 43 Pa. Cons. Stat. § 954(h); R.I. Gen. Laws § 28-5-6(J); S.C. Code Ann. § 1-13-30(c); Tenn. Code Ann. § 4-21-101; Tex. Rev. Civ. Stat. Ann. art. 5221k, § 1.04(a); Utah Code Ann. § 34-35-6(1)(a); Vt. Stat. Ann. tit. 21, § 495(c); Va. Code Ann. § 2.1-116.10; Wash. Rev. Code § 49.44.090(1); W. Va. Code § 5-11-3(q); Wis. Stat. Ann. § 111.33(1); Wyo. Stat. § 27-9-105(b). Three states only cover public employees in their state laws. *See* Ark. Stat. Ann. § 12-3502; Miss. Code Ann. § 25-9-149; S.D. Codified Laws Ann. § 3-6A-36.1. Alabama has no age discrimination in employment law.

Remedies for age and sex discrimination also include actions asserting violations of constitutional guarantees of equal protection. Damages for such constitutional violations have been excluded from income pursuant to Section 104(a)(2). *See, e.g., Madson v. Commissioner*, 55 T.C.M. 1351, 1352-54 (1988) (section 104(a)(2) excludes from income all proceeds received in settlement of action alleging violation of equal protection under the Constitution, notwithstanding the fact that damages consisted principally of lost earnings).

The Government's approach simply fails to accommodate the diverse remedies provided by state laws and the Constitution under which damages would clearly be excluded. Victims of age discrimination cannot always choose the forum or law under which their rights are asserted because agencies like the Equal Employment Opportunity Commission may initiate the age discrimination action on behalf of a group. Once commenced, a federal age discrimination lawsuit may, for practical purposes, foreclose remedies based on state law rights, thereby depriving individuals of more tax-advantageous fora under the Government's interpretation. Victims of discrimination would be forced to elect among federal suits, state statutory actions, state tort law, and other remedies in part on the basis of federal income tax considerations.

The Government's approach is also overbroad because it ignores a significant statutory difference between Title VII and the ADEA—the role of liquidated damages under the ADEA. While the nature of the injury and the remedies provided for age and sex discrimination are generally the same, the ADEA's provision of liquidated damages cannot be swept along with the Government's overbroad approach.

Unlike Title VII, the ADEA permits recovery of liquidated damages in the case of willful behavior on the part of the defendant. 29 U.S.C. § 626(b). Liquidated

damages are defined by statute to be equal to the amount of any lost earnings of the victim of age discrimination. 29 U.S.C. § 216(b). The ADEA also permits recovery of additional damages for loss of fringe benefits, insurance benefits, pension benefits, and retirement benefits. 29 U.S.C. § 626(b). The courts now uniformly hold that both lost earnings and liquidated damages under the ADEA are excludable from gross income under Section 104(a)(2). *Redfield*, 940 F.2d 542; *Pistillo*, 912 F.2d 145; *Rickel*, 900 F.2d 655; *Downey*, 97 T.C. 150; *Keller*, 62 T.C.M. 401. No court has ever held ADEA liquidated damages not to be excludable under Section 104(a)(2).

The Government's rationale for taxing the earnings lost from discrimination cannot apply to recipients of ADEA liquidated damages because they have already received compensation for lost earnings damages. Furthermore, since only victims of willful behavior are entitled to ADEA liquidated damages, there is no basis for characterizing such proceeds as deferred wages. The fact that the Sixth Circuit Court of Appeals partially relied on ADEA precedent does not justify the Government's wholesale grouping of the tax treatment of ADEA liquidated damages with ordinary damages.

CONCLUSION

Discrimination falls within the long-standing definition of personal injury because it invades a person's rights. The Congressional desire for expansive tax treatment of personal injury damages would be frustrated by adopting distinctions absent from the statute and regulations. The decision below furthers the Congressional intent underlying Section 104(a)(2) and should be affirmed.

Respectfully submitted,

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